

*a***DEVELOPMENT & COMMERCIAL BANK BERHAD****v.****PANDANGAN SELERA SDN. BHD. & ORS.**

HIGH COURT MALAYA, JOHOR BAHRU

LC VOHRAH J

b

[CIVIL SUIT NO. 23-621 OF 1987]

24 NOVEMBER 1990

CIVIL PROCEDURE: *Orders made by another Judge - Appeal by parties to Supreme Court - Stay application - Special circumstances - Fixing of date of appeal beyond control of parties - Irreparable harm - Undertaking by Counsel - Discretion of Court.*

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On 24 January 1990, Shankar J made an order (the first order) granting the 3rd and 4th defendant (D3 and D4) leave to defend the proceedings subject to a deposit of security of RM1.5 mil to the plaintiff D & C within 4 weeks; on 18 March 1990, another order was made by the same Judge for D3 and D4 to pay D & C the sum of RM4.4 mil (the second order). D3 and D4 now seek a stay of the execution of the two orders pending the hearing of the Supreme Court appeal.

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At the first adjournment, D & C's Counsel undertook not to execute the first order; at the next adjourned date, D & C's Counsel said that since no date had been fixed for the Supreme Court appeal, he did not wish to continue his earlier undertaking. The issue was what factors would constitute special circumstances for granting of a stay.

*e***Held:**

[1] The fixing of the date of the appeal was not within the control of Counsel for D3 and D4 and it was no fault of Counsel or of the two defendants that a date had not been fixed for the hearing of the appeal.

[2] The defendants had grounds for arguing that there might be triable issues, it is not for the Court to decide as to whether the judgment impugned given by a Judge of co-ordinate jurisdiction was correct or not as that was a matter for the Supreme Court.

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[3] The distinct possibility of bankruptcy proceedings would cause irreparable harm to the professional standing of D3 and D4 if stay was not granted in the event D3 & D4 succeeded in the appeal.

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[4] It was not fair for Counsel for the plaintiff to resile from his previous stand when he gave his undertaking not to execute pending the disposal of the appeal.

[Stay granted.]

For the plaintiff - R. Brockett (Paul Tan with him); M/s. Brockett & Co.

For the defendants - P. Suppiah; M/s. Suppiah & Co.

*h***JUDGMENT****LC Vohrah J:***i*

This was an application on the part of the third and fourth defendants for an order that the execution of two orders made by Shankar J, one made on 24 January 1990 (the first order) and the other on 18 March 1990 (the second order), be stayed pending the hearing of the appeal thereof by the Supreme Court in Civil Appeal No. 02-72 of 1990. In the first order the learned Judge granted the two defendants:

leave to defend subject to the condition that the 3rd and 4th defendants either deposit in the High Court or give security to the plaintiff in a manner acceptable to the plaintiff for the payment of the sum of Ringgit RM1.5 million as and when ordered by the Court so to do and ... that such deposit or security ... be made within four (4) weeks from the date of this order.

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The second order directed that:

the 3rd and 4th defendants do pay the plaintiff the sum of RM4.4 million together with interest thereon

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When the application came up for hearing before me on 12 June 1990, it was adjourned for hearing to 12 November 1990 on the specific undertaking given by Counsel for the plaintiff that no execution would be taken on the first order in the light of the fact that the two defendants had filed an appeal against both the orders in the Supreme Court. On 12 November 1990 when the application came up for consideration again Counsel for the plaintiff indicated that since no date had yet been fixed for the hearing of the appeal in the Supreme Court he did not wish the undertaking to continue. He asked that the application be heard on its merits and referred me to an article by Zainur Zakaria entitled "Stay of Execution Pending Appeal - Special Circumstances v. Probability of Appeal Being Allowed" [1990] 1 MLJ lxxviii and argued that special circumstances must be shown by the two defendants before stay could be granted as prayed. That appears to be the law as laid down by a long line of cases referred to in the article but no clear definition has been given as to what the factors are which would constitute special circumstances.

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I considered the following facts. It was not in dispute that the appeal record had actually been filed and that all necessary steps had been taken by Counsel for the two defendants to have the appeal heard. The fixing of the date of the appeal was not within his control and it was no fault of Counsel or of the two defendants that a date had not been fixed for the hearing of the appeal. Counsel however gave the assurance that he would take steps to have the appeal heard expeditiously. I then considered the memorandum of appeal filed in the Supreme Court and was of the view that the defendants had grounds for arguing that there might be triable issues. I did not think it was for me to decide as to whether the judgment impugned given by a Judge of co-ordinate jurisdiction was correct or not as that was a matter for the Supreme Court. I also considered the distinct possibility of bankruptcy proceedings being taken and of the irreparable harm they would cause to the professional standing of the 3rd defendant as an engineer and of the 4th defendant as a practising architect if stay was not granted pending the appeal in the event the two defendants succeeded in the appeal. I also considered that it was not quite fair for Counsel for the plaintiff to resile from his previous stand when he gave his undertaking not to execute pending the disposal of the appeal. In the circumstances I exercised my discretion in granting a stay as prayed for and made an order for costs of the application to be costs in the cause.

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Also found at [1991] 1 CLJ 520

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